Thus, the more natural reading would be for joint marketing of exchange and interLATA service by the BOC affiliate to be allowed only if independent entities offering interLATA service have been permitted to jointly market interLATA and BOC exchange services as well.

The Commission should also clarify that the term "same or similar service" means not only the interLATA service of the affiliate but information service as well. Thus, the joint marketing by a BOC affiliate of information service and telephone exchange service should not be permitted unless other information service providers may jointly market those services as well.

Sprint also concurs with the Commission's observation that Section 272(g)(2) does not bar certain large interexchange carriers from jointly marketing local exchange services obtained via interconnection pursuant to Section 251(c)(2) or through the purchase of unbundled network elements pursuant to Section 251(c)(3). Sprint further agrees that the term "market or sell" should be read similarly to the term "jointly market" in Section 271(e).

Sprint believes that the examples of the types of activities which the Commission thinks may be encompassed by the prohibitions against joint marketing are in fact so encompassed,

subject to the following important caveat: these kinds of restrictions only affect a covered interexchange carrier's marketing efforts with respect to BOC services that are resold pursuant to Section 251(c)(4). These and similar activities are permissible when the covered interexchange carrier obtains BOC services or facilities under Section 251(c)(2) or (c)(3) rather than under (c)(4).

Sprint believes that there is no conflict between Section 272(g)(3)'s savings provision on discrimination and the separation requirements of Section 272(b). Section 272(g)(3) provides that joint marketing by the BOC and its affiliate does not violate the nondiscrimination provisions of Section 272(c). Those nondiscrimination provisions are directed towards behavior of the BOC.

Section 272(b)'s separation requirements, by contrast, are directed towards the BOC's affiliate. The BOC's joint marketing activities would, in the absence of Section 272(g)(3)'s savings clause, violate the prohibitions on discrimination by the BOC. However, Section 272(b) makes no exception from the separation requirements imposed on the affiliate for the latter's joint marketing activities with the BOC. For example, the BOC and its affiliate may engage in joint marketing without having common

employees and without having the BOC guarantee the affiliate's credit in such a manner as to give creditors access to BOC assets in case of default.

Thus, as the Commission suggests, the affiliate should have to obtain marketing services from the BOC on an arm's length basis, in writing, subject to public inspection as required by Section 272(b)(5). Sprint also believes that the BOC and its affiliate should, as the Commission suggests, be required to jointly contract with an outside marketing entity with each paying for its portion of the marketing services received as allocated under CC Docket No. 86-111.

While the statute does not require this result, the use of an outside marketing entity will make it much easier for the Commission and the public to ensure that neither competition nor monopoly local ratepayers are being harmed by such joint activities. Unless the Commission is certain that its separation requirements are sufficiently robust and auditable to achieve the same goal when the affiliate uses the BOC's marketing services, it should require the use of such an outside marketing entity.

VII. ENFORCEMENT OF SECTIONS 271 AND 272

The Commission states that

> [E]nforcement of the statutory separate affiliate and nondiscrimination safeguards

> established by sections 271 and 272 and the rules that we may adopt to implement those provisions will be critical to ensuring the full development of competition in the local and interexchange telecommunications markets (¶94).

It is clear that for such "critical" regulatory enforcement to be carried out, it must be carried out as an integral part of a larger plan. That plan is laid out in the 1996 Act.

First, the Act forbids a BOC from providing in-region interLATA telecommunications service until it can meet the test for entry in Section 271(d)(3). As noted earlier, the requirements of Section 271(d)(3) were intended to ensure that BOC entry was to be permitted only where local, facilities-based competition was sufficiently active to protect the public interest by deterring the BOC from using local revenues (including access revenues) to finance or cross-subsidize any competitive foray into the interLATA telecommunications market.

Second, when the BOC enters the interLATA telecommunications market, it is required, subject to limited exception, to do so through a separate affiliate meeting the requirements of Section 272. And, third, the Act forbids discrimination between the BOC itself (and generally its Section 251(c) affiliate) and its interLATA separate affiliate. It is left to the Commission to

implement any rules, tariffing requirements or reporting requirements that it deems useful in regulating transactions between the BOC and its separate affiliate so that discrimination can be readily detected.

The Commission already requires the Bell Operating Companies to comply with its cost allocation rules, to file and obtain approval of their Cost Allocation Manuals, and to "submit annually the results of an independent attestation audit attesting that the cost allocation manual has been properly implemented and that the company's cost allocations are the product of accurate methods." *Joint Cost Order*, CC Docket No. 86-111, 2 FCC Rcd 1298, 1300 (1987), *recon.* 2 FCC Rcd 6283 (1987), *further recon.* 3 FCC Rcd 6701, *aff'd sub nom. Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.C. Cir. 1990).

It has also begun a proceeding in CC Docket No. 96-150 to modify its current cost accounting and affiliate transaction rules in order to achieve greater protection against subsidization. *See Accounting Safeguards NPRM*, FCC 96-309, released July 18, 1996.

Only if these steps are properly implemented can there be any cause to believe that enforcement by the Commission will be effective in preventing serious discrimination. The Commission

does not have the resources to process multiple, complex complaints, nor is there the time to do so. Any harm that is done to interLATA telecommunications competition during the pendency of a complaint will likely prove very difficult or impossible to undo. Consequently, if enforcement is to be effective, it must be swift. The Act effectively recognizes this need by requiring that the Commission resolve all complaints under Section 271(c)(3) within 90 days (see §271(c)(6)).[33]

Nevertheless, the need for expedition in the enforcement of Section 271 and 272 also gives rise to a serious dilemma. As the Commission appears to recognize, there is reason for serious concern that the evidence necessary to demonstrate that a violation of the Act has occurred is typically in the hands of "defendant carriers" and that the BOCs "in particular...have an inherent advantage in [complaint] proceedings because of their control over the information regarding their service offerings and related practices..." (¶101). It would seem apparent that in

[33] Although complaints under Section 271(d)(6) deal only with failures of BOCs to meet the conditions for entry in subsection (d)(3), these conditions require nondiscriminatory treatment of unaffiliated interLATA carriers pursuant to the Competitive Checklist in Section 271(c)(2)(B). There is plainly considerable overlap between the nondiscrimination provisions in the Competitive Checklist and the prohibitions against discrimination in Section 272.

a proceeding of short duration (such as 90 days), meaningful discovery is out of the question. The most that the Commission can reasonably expect to rely upon as a basis for decision would be the complaint itself, defendant's response and a reply. And, even these pleadings will have to be filed within a very short timeframe.

Although the Commission suggests measures "...to assist parties in their pursuit of complaints alleging violations of Sections 271 or 272" (¶101), the dilemma presented by the need for rapid enforcement, on the one hand, and the inability of complainant to gather evidence without the assistance of the Commission, on the other, is, to a large degree, inherent in the complaint process. This conflict may perhaps be alleviated in some respects (as the Commission suggests[34] and as discussed below), but it cannot be completely eliminated.

As a consequence, the difficulty of enforcement must be considered by the Commission as an important element in any determination as to whether it is in the public interest for a BOC to provide in-region, interLATA service under Section

[34] See, especially, ¶¶101-104.

271(d)(3). There can be no reasonable expectation that the harm to competitors and to the BOC's own local customers that would follow premature entry can be "made good" by strict regulatory enforcement.

A. Mechanisms To Facilitate Enforcement

Sprint has already commented herein on "requirements or mechanisms" necessary to detect discrimination and other violations in earlier sections. To the extent that the Commission adopts rules, tariffing obligations and reporting requirements, it should also seek to enforce compliance by "third party" auditing procedures performed on an annual basis as already required by the Commission's rules (47 CFR §64.904). Such audits would be in addition to the biennial audits required under Section 272(d)(1).

In order for interested parties to play a meaningful role in the enforcement process, they must be able "to identify the goods, services, facilities, or information that has been provided..." (¶96) by a BOC to a Section 272(a) separate affiliate. This can be done only if the number of such transactions is limited by strict separate affiliate requirements -- that is, by requiring the BOC affiliate to operate independently under Section 272(b)(1) and only "on an arm's-

length basis" under Section 272(b)(5) -- and by making public the rates, terms and conditions of the transactions that do take place; *i.e.*, by requiring tariffs or price lists.

It would seem clear that a BOC could not meet the nondiscrimination requirements of Section 272(c)(1) and (e) if it "...provides varying levels of service between its affiliate and third parties..." (¶96), unless such differentials are in response to different network requirements or otherwise at the behest of the unaffiliated party, and only if the difference in price for the different levels of service is cost-justified. Sprint sees no basis for any deviation from the nondiscrimination requirements established in Section 272(c)(1) and (e).

B. Section 271 Enforcement Provisions

While the measures proposed are plainly of limited utility, Sprint supports the Commission's effort to assist a complainant by redefining its burden of proof.[35] The Commission should consider that a complainant has made a *prima facie* case if it (1)

[35] Sprint agrees with the Commission's tentative conclusion that "§271(d)(6) generally augments the Commission's existing enforcement authority" (¶97). Sprint also agrees with the Commission that where a party seeks damages or other relief that is not available under §271(d)(6), the 90-day time limit does not apply to the grant of such additional relief (¶97).

alleges all the facts necessary to show a specific violation under Section 271(d)(3), and (2) presents all evidence in support of such facts which it may reasonably be expected to be in a better position to obtain than the defendant BOC.[36] When such a *prima facie* case has been made, the burden of proof -- or at least the burden of going forward -- would then shift to the BOC defendant and the BOC would become responsible for presenting rebuttal evidence to deny complainant's allegations.[37] This definition of a *prima facie* case for purposes of Section 271(d)(6) obviously leaves a lot to be determined by the Commission in individual proceedings. However, this may not be altogether bad. Any vagueness in the standard proposed may well encourage both the complainant and the defendant to bring forth whatever evidence they have in their favor or can obtain, or risk losing the complaint. Unfortunately, there is no way -- absent discovery -- to effectively require a BOC to produce relevant

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[36] This would, of course, ordinarily include all facts already within complainant's possession.

[37] Sprint agrees with the Commission's determination that the "opportunity for hearing" permitted under §271(d)(6) does "not require a trial-type hearing before an Administrative Law judge (ALJ) (an APA Hearing)..." (¶106). As the Commission points out, Congress could not have intended that such a hearing would be completed within 90 days.

evidence that is in its sole possession, but that is harmful to its case.

Because of the widely varying and perhaps largely unforeseen circumstances that may arise in Section 271(d)(6) complaint cases,[38] it would not seem practicable for the Commission -- at least at this time -- to set forth rules providing specific *prima facie* requirements in different cases.[39] However, there is at least one exception. Where a complainant alleges and provides facts sufficient to show a specific act of discrimination, that is all that should be required for a *prima facie* case. Complainant should not have to show or even allege that such discrimination was unjust, unreasonable, knowing, etc. Of course, in justifying its "discrimination" (*e.g.*, by providing the applicable costs) defendant would not -- in this situation or otherwise -- be required to "prove a negative."

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[38] Given the widely differing circumstances that are likely to be confronted in §271(d)(6) complaints, Sprint does not see how it would be possible at this point for the Commission to "establish specific legal and evidentiary standards for each type of sanction" (¶106).

[39] Although not strictly relevant in this proceeding, it would seem fair to note Sprint's concurrence with the view that the "discovery mechanism contained in the Commission's formal complaint rules...is cumbersome and seldom produces on a timely basis information of decisional significance" (¶101). Regardless of the Commission's decision in this proceeding, improvement of the Commission's "discovery mechanism" deserves serious attention.

It is also clear that the 90-day time limit in Section 271(d)(6)(B) or a similar brief time limit for other complaints need not prevent all discovery under Sections 271 and 272. As the Commission has tentatively found (¶98), it has the right to investigate any suspected violation of Sections 271 and 272 on its own motion and to determine that a violation exists. The Commission does not have to complete its investigation or determine a violation within 90 days and therefore it can take the time to itself undertake any discovery it deems relevant. Similarly, if the Commission finds, in a particular case, that a complainant has not met its burden of proof and that the complaint must therefore be dismissed, it may still decide that there is sufficient evidence of a violation to continue the investigation on its own, to make discovery available to the former complainant, or to do both. After sufficient evidence has been gathered, the Commission may make a determination of a violation on its own motion or the former complainant may be allowed to file a new complaint based on discovered evidence.

VIII. CLASSIFICATION OF BOCs AND THEIR AFFILIATES AS DOMINANT OR NON-DOMINANT CARRIERS

In its Comments and Reply Comments in CC Docket No. 96-61,[40] Sprint supported the Commission's tentative determination that in most cases, the Commission could rely upon the single common, national product and geographic market set forth in the *Competitive Carrier* proceedings.[41]

At the same time, Sprint also supported the Commission's further belief that in other cases, the Commission may need to consider narrower product and geographic markets to determine the existence of market power. For example, Sprint noted the "glaringly apparent" need to consider a regional Bell Operating Company's market power within its region as opposed to outside its region.

Sprint therefore supported continued general reliance on *Competitive Carrier* for the time being. Sprint also urged the Commission to examine the issue of market definition in light of the Department of Justice/Federal Trade Commission's 1992 *Merger*

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[40] *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, FCC 96-123, released March 25, 1996.

[41] Sprint Comments at 4.

Guidelines as new and different situations arose and as competition evolved in the telecommunications market.

Sprint therefore concurs generally with the Commission's tentative conclusion that it should "treat all interstate, domestic, interLATA telecommunications services as the relevant product market for purposes of determining whether the BOC affiliates have market power in the provision of interstate, domestic, interLATA services" (NPRM, ¶119). However, the Commission should retain the ability to examine various product markets if circumstances require, as no one can predict the future. Subject to the same *caveat*, Sprint also concurs with the Commission's tentative conclusion to treat "all interstate, domestic interexchange telecommunications services as the relevant product market." Id.

The Commission also proposes to divide the product markets for international service into two products: international message telephone service (IMTS) and non-IMTS, based on the Commission's 1985 *International Competitive Carrier* decisions.[42] It proposes to retain the same product definitions for the

[42] 102 FCC 2d 813 (1985), recon. den. 60 RR2d 1435 (1986).

provision of international service by the BOCs' affiliates and the independent LECs.

Sprint believes that the Commission should tread carefully before defining international communications as composed of two products. The international communications market is changing rapidly, in part due to the Commission's own actions.[43] Where providers, with or without the Commission's blessing, engage in the resale of international private lines that are interconnected to the public switched network at both ends, for example, the distinctions between IMTS and non-IMTS blur. Consequently, the Commission should retain the flexibility to take into account the changing state of the product market for international communications.

The Commission requests comment about relevant geographic markets as well. For the reasons enunciated in paragraph 125 of the NPRM, Sprint concurs with the Commission's tentative conclusion that it should "evaluate a BOC's point-to-point markets in which calls originate in-region separately from its point-to-point markets in which calls originate out-of-region,

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[43] See, e.g., Policy Statement on International Accounting Rate Reform, FCC 96-137, released January 31, 1996.

for the purpose of determining whether a BOC interLATA affiliate possesses market power in the provision of in-region, interstate, domestic, interLATA services" (NPRM, ¶126).

Sprint, however, adds one *caveat*. As the Commission is aware, SBC Communications, Inc. and Pacific Telesis Group have agreed to merge. Bell Atlantic and NYNEX have also agreed to merge. Even though these mergers have yet to be completed, the Commission has already determined that "in the period prior to a merger's consummation, one partner to the merger may act in ways to favor those out-of-region services of its merger partner that originate in the first partner's service territory."[44] For this reason, the Commission excluded from the services covered by its Order in Docket No. 96-21 those out-of-region services that originate in the in-region states of a merger partner during the period prior to the consummation of the merger. The Commission

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[44] *Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services*, CC Docket No. 96-21, FCC 96-313, released July 24, 1996. There, the Commission refused to accord non-dominant treatment to out-of-region services provided by a BOC affiliate that originated in the prospective merger partner's territory: the Commission said it had an insufficient record to determine whether a prospective merger between two Bell holding companies might cause them to favor each other's out-of-region services pending completion of the merger. Id. at para. 33. The Commission said it lacked an adequate record in Docket No. 96-21 to accord non-dominant treatment to a BOC's out-of-region services originating in a prospective merger partner's territory.

should reaffirm here that mergers, acquisitions, and similar combinations by BOCs may require consideration of geographic markets more extensive than a particular BOC's region.

With respect to the proper regulatory classification of a BOC interLATA affiliate, Sprint believes that the classification of that affiliate as dominant or nondominant should turn in large part upon the kind and degree of separation between the BOC and its affiliate and how quickly the Commission can rationalize current anomalies in interstate access pricing. There is little serious debate that the BOCs themselves retain significant market power, and the more closely the BOC and its interLATA affiliate are intertwined, the more opportunities will exist for the BOC to leverage that market power into the interLATA market by using the interLATA affiliate as a vehicle as Sprint earlier demonstrated.

Respectfully submitted,

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August 15, 1996

CERTIFICATE OF SERVICE

I, Joan A. Hesler, hereby certify that on this 15th day of August, 1996, a true copy of the foregoing "COMMENTS" of Sprint Communications Company, was hand delivered to each of the parties listed below.

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Attachment A

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